

Exhibit 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENTERTAINMENT SOFTWARE
ASSOCIATION, VIDEO SOFTWARE
DEALERS ASSOCIATION, and
MICHIGAN RETAILERS
ASSOCIATION,

Plaintiffs,

v.

HONORABLE GEORGE CARAM STEEH

No. 05-73634

JENNIFER GRANHOLM, in her
official capacity as Governor
of the State of Michigan;
MICHAEL A. COX, in his
official capacity as Attorney
General for the State of
Michigan, et al, and KYM L.
WORTHY, in her official
capacity as Wayne County
Prosecuting Attorney,

Defendants.

/

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Monday, October 31, 2005

APPEARANCES:

For the Plaintiffs: DENNIS J. LEVASSEUR, ESQ.

For the Defendants: DENISE C. BARTON, ESQ.

To Obtain Certified Transcript, Contact:
Ronald A. DiBartolomeo, Official Court Reporter
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 740
Detroit, Michigan 48226
(313) 962-1234

*Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.*

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Detroit, Michigan

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5 **THE COURT:** Okay. This is Entertainment
6 Software versus Jennifer Granholm. This is plaintiff's
7 motion for preliminary injunction.

8 MR. LEVASSEUR: The question before the Court
9 today is, of course, is whether to allow or to go into
10 effect a law which expressly bands the distribution and
11 display of fully protected speech based on a disfavored
12 content, and I think it is fair to say that it is a rare
13 day, indeed, when that is the right answer to allow such
14 law to go into effect under the First Amendment, but I
15 thought before we get further into the issue on the
16 constitutional provision of a preliminary injunction, I
17 just want to talk a little bit about the practical aspects
18 of this, the equities that ought to be considered as well
19 by the Court if I could.

20 It is, of course, clear that the allowing an
21 unconstitutional law to go into effect causes irreparable
22 harm to -- under the First Amendment. That's pretty well
23 established.

24 In addition though, if this law is allowed to go
25 into effect, there will be a lot of practical problems

1 with the many retailers across the state who are suddenly
2 going to have to figure out which games are and are not
3 covered by the statute, deciding which ones will be
4 displayed in the stores, which ones that have to require
5 I.D.'s for to sell as they are just about to get ready for
6 the Christmas season. There is only four weeks before the
7 law takes affect. So there are very serious practical
8 problems.

9 In terms of the equities on the other side, I
10 think it is important to recognize that it is not as if
11 the state or the country are facing some intimate public
12 health emergency that the Court needs to take into
13 account. In many ways the crime situation in this country
14 cuts against it in claim of necessity to for this kind of
15 ever regulation of speech in accepting the proposition
16 which I don't accept, that there is any evidence out there
17 that these games are causing any bad behavior in the
18 world.

19 With the Court's indulgence, I went to the
20 Department of Justice web site the other day, and I would
21 proffer one more piece of evidence if I could, which is
22 just evidence about crime statistics in this country, both
23 juvenile statistics and overall violent crime statistics.
24 With the Court's indulgence, I will hand it up.

25 THE COURT: All right.

1 MR. LEVASSEUR: What these two documents
2 show, the first of all the single page document deals with
3 overall violent crime rates in this country. As you'll
4 see, the Justice Department reports that there was a
5 precipitant decline in violent crimes in this country
6 every year since 1994 to the point where in 2004 violent
7 crime reached the lowest level reported by the Department
8 of Justice. And over on the second document dealing with
9 violent crime for juveniles, on Page 5 of that document,
10 there's a graph that says -- this shows that the juvenile
11 violent crime index in 2003 was lower than any years since
12 at least 1980 and 48 percent below the peak year of 1994.

That year 1994 is significant because that's, as
the articles that the state has put in the record reflect,
that's about the time when these are more realistic and
more graphic violent video games became popular and began
to be sold.

18 So what we have here is a phenomenon in this
19 country where this particular medium has been singled out
20 as having cause some great problem in the country and in
21 reality there's no indication, at least in terms of
22 overall crime rates, that there is correspondence between
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22 overall crime rates, that there is correspondence between
23 reality and the claims that are being made about that
24 particular medium.

Finally, just one more point about the practical

1 affects. Even taking this study at face value, they are
2 talking about long term effects over years not any
3 immediate thing. So allowing the law to go into effect
4 they are not going to effect -- isn't going to do anything
5 in the short run while we take the time to litigate rest
6 of this case. They can't claim that sometime in the next
7 two weeks if that law doesn't go into effect, there is
8 going to be any affect on the way people behave or the way
9 their psyche are affected.

10 Now taking -- since I'm giving up value on
11 equities, I think all we have to do is have a reasonable
12 likelihood of success on the merits, but the reality is we
13 have highlighted the success on the merits, and the reason
14 for that I think is because of law is very clear,
15 including the binding decision of the Sixth Circuit in the
16 James case which largely answers the questions before this
17 Court. It holds first of all, that a law like this --
18 it's equivalent for many purposes -- this kind of law
19 would subject to the strict scrutiny of violent video
20 games. Like any of the video games are protected
21 expression, and when we try to sensor them based on their
22 violent content, that requires constitutional scrutiny of
23 the highest burden.

24 The other important point that the James case
25 makes is that when you -- if you're trying to justify such

1 a law based on the supposition that these games are going
2 to cause people to go out and be violent, be aggressive to
3 commit crimes, then you get into the whole category of
4 Brandenbrug where there is a strong, strong presumption
5 against censored speech in order to affect the conduct of
6 those people who would be the recipients of the speech.

7 The usual rule that almost in every circumstance
8 is that you punish the conduct, you regulate the conduct.
9 You don't regulate the speech. Even if you think that it
10 might, in fact, have some role in motivating that conduct,
11 that is not the way our system works. The only exception
12 under Brandenburg where you have incitement which means
13 speech aimed at inciting imminent law as violence and
14 likely to cause imminent law as violence, a claim that is
15 not even being made here.

16 All of those points are made in the James case
17 where Judge Balk explained all the reasons why a tort suit
18 seeking to punish the sellers of these same kinds of games
19 would be unconstitutional, and I think the law does the
20 same thing would have to meet the same standards, the
21 standards which on its face the evidence of the state has
22 come forward with doesn't even not come close to meeting.

23 What do they do then? They say, we're not trying
24 to prevent violence. We're trying to prevent
25 psychological harm, but if you push a little bit of what

1 it is they mean when they say "psychological harm", what
2 the brief says, what the studies say, psychological harm
3 makes people more aggressive, more violent. So it is all
4 circular, and to the extent it means anything else other
5 than that, other than behavior, what they're saying, we
6 think we should be able to regulate this speech because it
7 makes people feel a certain way, think a certain way, a
8 very, very problematic justification for a law under the
9 First Amendment.

10 Another case that I think is very helpful in that
11 regard is the Supreme Court decision in Ashcroft versus
12 Free Speech Coalition that we cite in our papers. That
13 was a case about what they called virtual child
14 pornography, which looked like child pornography, but were
15 not made with actual children. They were computer
16 generated or made with young adults who looked like
17 children. The Supreme Court said that material is fully
18 protected under the First Amendment, and validated a
19 federal law that attempted to censor that material, and
20 one of the justifications that was offered there was that
21 this material will encourage people to out and commit
22 crimes against children. It is also psychologically
23 harmful to people, and the court said no. Brandenburg
24 controls. We have to be very careful. We certainly don't
25 think it is thought control by itself which is something

1 that the First Amendment allows, it contemplates, and so I
2 see between the James case and the Free Speech Coalition
3 case and, of course, the decisions of the Seventh and
4 Eighth Circuits, and other courts who have had cases
5 almost exactly like this case, the law is very clear that
6 these kinds of justifications, these kinds of arguments
7 are not going to satisfy strict scrutiny. Much of what
8 they are saying is that it is wholly legitimate under
9 First Amendment. You can't come in and say we don't think
10 it would be good for people to have these feelings. We
11 don't think it would be good for people to have these
12 thoughts.

13 There are a whole variety of other problems that
14 Judge Posner pointed out in his opinion in the Seventh
15 Circuit. One of the problems with these kinds of laws is
16 that they completely ignore the fact that there are a
17 whole lot of other media out there that have just as much
18 violence or more violence than what we are talking about
19 in video games.

20 What this law would mean potentially, depending on
21 how you would apply it -- and I'm not sure how you can
22 ever be sure on how the law cuts on any one game -- but it
23 might well mean that it is illegal for a 16 year old to
24 buy the Lord of the Rings game even though you go buy him
25 the video or the movies. There's an enormous amount of

1 violence in those movies and there is violence in the
2 games too, but that makes very little sense to try to
3 limit sales or access to one and not the other, because
4 for one thing it means it is unlikely to actually have any
5 impact even if you assume that media do turn kids into
6 more violent kids, which if we ever have to have an
7 analysis of all of that, believe me, there is a whole lot
8 of expert testimony on the other side and cross
9 examination.

10 I guess my point today is not that you should be
11 sifting through all of the studies and trying to decide
12 who's right or who's wrong about the science. The science
13 does not on its face justify the law because it doesn't
14 satisfy the incitement standard. It doesn't show anything
15 else which would justify censoring protected speech.

16 **THE COURT:** It wasn't clear to me that the --
17 your opponent in this case would concede that incitement
18 is not an issue relative of some evidence to support that
19 contention that this violent crime is not designed to
20 incite --

21 **MR. LEVASSEUR:** I don't think they claim
22 there is a design to incite violence, which is one of the
23 elements that you have to satisfy. The only thing that I
24 read them to say about that is they found some example of
25 a car accident that occurred where some crazy teenager got

1 in the car and tried to imitate this driving game that he
2 had been playing and he drove and caused an accident, and
3 somehow that satisfies the Brandenburg standard. It
4 doesn't make the speech incitement that somebody reacted
5 to it. People have been trying to do these copycat
6 arguments for years on TV, on movies, video games. They
7 are never allowed because it's just one person's reaction,
8 and if we are going to sensor things on the basis of that,
9 where does it stop?

10 THE COURT: The other thing that your
11 opponent argues is that these games are somehow
12 distinguishable from the other media by their interactive
13 nature.

14 MR. LEVASSEUR: They don't have any evidence
15 of that. There is nothing even in their own scientific
16 studies. It is Professor Anderson who is the guy that
17 comes to each of these places and testifies. He doesn't
18 claim that he has any scientific evidence. He says, well
19 it stands for reason that it might be worst, but other
20 articles which they included show that TV effects are
21 stronger than the video game effects. I don't see any
22 basis for, in fact, for doing that, for saying that. It
23 certainly they are not more violent. I mean, if you watch
24 the same movie as the game, it is probably more realistic
25 to see the Lord of the Rings movie than it is to play the

1 Lord of the Rings game which is a cartoon. It is not a
2 movie. So I don't see how you can rally do that.

3 There is a whole other problem of vagueness which
4 is how you apply a standard which says extreme violence
5 and graphic depiction which has to be -- the victim has to
6 be real, appearing to be a human, which in the video game
7 world is a very difficult problem. People go and come
8 between human and other forms. There are zombies,
9 there's -- you know, how do you figure out who exactly
10 qualifies, but the primary problem here is it is just
11 plainly content base sensorship of speech that is not in
12 any way lesser protection than any other speech, and they
13 don't have a basis for this either legitimate -- even
14 legitimate let alone sufficiently compelling that you can
15 get over the strict scrutiny standards.

16 THE COURT: This general proposition of the
17 Court would be considering constitutional challenges to
18 the statute as applied as distinguished from finding that
19 it is unconstitutional on its face preliminary injunctive
20 relief would not be appropriate, is that a fair statement?

21 MR. LEVASSEUR: I suppose that -- depends on
22 what kind of challenge it was, your Honor. I mean, in
23 some situations I think it might still be appropriate, but
24 clearly here we're talking on its face. The entire law
25 needs to be held -- needs to be narrow. Here we're saying

1 enjoin the entire operation of the law because on its face
2 in its entirety it is unconstitutional, and the equities
3 certainly argue in favor of maintaining the status quo in
4 the meantime given all the things that I mentioned at the
5 outset.

6 Your Honor, perhaps it make sense, since the
7 burden justifying this law under the First Amendment falls
8 on the state, the burden of coming forward with sufficient
9 state interest and explaining why that's the least
10 restrictive method. Perhaps I should at this point turn
11 over the podium and see what kind of justification they
12 want to emphasize today, and perhaps come back and do
13 rebuttal.

14 THE COURT: That's fine. Thank you.

15 MS. BARTON: Good afternoon. Denise Barton
16 on behalf of the state defendants.

17 I would like to respond -- or at least address the
18 first point which is that the plaintiffs are asking for--
19 enjoin the implementation of the entire statute. In this
20 case they are actually only challenging one part of the
21 statute. Plaintiffs are not challenging the sexually
22 explicit nature of the statute and so I don't see how they
23 justify enjoining the entire statute when they conceded
24 that at least part of the statute does comply with the
25 law.

1 Now with respect to the ultra-violent explicit
2 video game aspect of the statute, that's part two of the
3 law, and that's essentially why we're here today.

4 Now plaintiffs have submitted some crime
5 statistics which by having them presented today, obviously
6 I have not had an opportunity to look at them, but in
7 essence, our argument is not that because crime is going
8 down, that's why the legislature considered this evidence
9 when it was deciding whether to pass the statute. In
10 fact, if you look at findings of the statute, you will
11 find that the legislature specifically had before it a
12 number of studies which talked about the juvenile brain is
13 not only different from the adult brain, but the level of
14 maturity of an individual who is a juvenile means that
15 person is subject to peer pressure, that person's brain is
16 more malleable. If anybody had any teenagers, you would
17 well see how sometimes they are impacted by other
18 influences which in an adult would not be, and I call this
19 Court's attention to the case of Roper v Simmons, which is
20 the death penitentiary case which the Supreme Court
21 decided, and the reason why I would like this Court to
22 look at this case very closely is because in Roper, the
23 Court relied on social science research, and that social
24 science research provided three reasons why the court said
25 you cannot execute a juvenile under th age of 18, and

1 those three reasons are that the juvenile has a lack of
2 maturity and an underdevelop sense of responsibility.
3 Juveniles are more vulnerable or susceptible in the way of
4 influences and outside pressures, and the character of a
5 juvenile is not the same as that of an adult.

6 Now there has been no court that has addressed
7 this video game issue since Roper v Simmons was handed
8 down, and there has been no U.S. Supreme Court decision
9 that says that the Michigan legislature could not adopt
10 the statute which limits access of altra violent explicit
11 video game to minors.

12 I would like bring special attention to the fact
13 that what the law is not saying, it is not saying that a
14 juvenile can never look at mature rated video, or that a
15 parent cannot buy a mature rated video for an adult (sic).
16 What the legislature says, we do not want retailers making
17 the decision of what kind of video games are being played
18 in the home, and this Court -- the U.S. Supreme Court
19 rather in Ginsberg recognizes that parents do have a
20 special role in rearing the morals and values of their
21 children.

22 Now with respect to whether Brandenburg applies,
23 as our brief makes clear, the state does not need to
24 revive world war harms despite the fact that we do have
25 one fatal accident which occurred in Ingham County in

1 which one individual was killed after having watched a
2 violent video game and another person, as we understand
3 it, is in a coma and will not -- and is not likely to
4 recover.

5 And as to who has the burden of proof, the
6 plaintiffs have the burden of proof in seeking an
7 injunctive relief, and even though the Christmas season is
8 coming up, and the fact that, in terms of the equities,
9 the industry even admitted when they presented testimony
10 at the hearing in Lansing, that we're only talking about a
11 seven percent of all the video games are rated mature.
12 You're not talking about this law impacting the entire
13 realm of video games.

14 THE COURT: Wait a minute. Rated mature by
15 whom?

16 MS. BARTON: Rated mature by their own
17 industry.

18 THE COURT: So is it then that rating system
19 the system that would be employed to decide whether these
20 videos are too explicitly violent or not?

21 MS. BARTON: Well, in terms of the rating
22 system, the rating system is used -- can be used in the
23 affirmative defense part of the statute, and the industry
24 at least back when the legislature was considering the
25 statute, we're only talking about the mature rated videos

1 because by their own rating system, a mature video is one
2 that should not be look at by someone under the age of 17.
3 So we're talking only about a narrow percentage of the
4 video games that would be involved in this case.

5 THE COURT: I don't really know, but I would
6 suspect that seven percent sounds like a small proportion
7 of the video games, but nevertheless it would amount to a
8 lot of video games in absolute numbers.

9 MS. BARTON: They have not come forth and
10 shown any statistics of how many games we are talking
11 about. What they are saying is no, you should not make
12 any change in the law. Keep the law status quo because
13 seven percent of the games, a particular retail
14 establishment might have some difficulty in applying the
15 law.

16 THE COURT: If you're a retailer in the
17 business, how would you apply the law? Wouldn't you
18 simply to be safe to avoid going to jail decide not to
19 sell any mature rated video games to minors?

20 MS. BARTON: What would I do if I was
21 retailer?

22 THE COURT: Yes, assuming you didn't want to
23 go to jail.

24 MS. BARTON: I think what I would do is look
25 at the rating system, read the statute, and as to those

1 which there might be a question, they have counsel.
2 Mr. Smith been retained. In fact, he's in litigation now
3 in the Seventh Circuit on this issue, and they call upon
4 him for his advise and counsel. In fact, when the
5 plaintiffs filed their reply brief, they attached two
6 expert reports which we would like the Court to disregard
7 those two reports for one, the reports are submitted in a
8 reply. We have not had an opportunity to take those
9 depositions of the individuals whom are proffering as
10 experts, at least in their reply.

11 Additionally, their reports refer to paragraphs
12 from other reports which have not been provided. So I am
13 at a loss and this Court is at a loss as to the strength
14 of those expert reports.

15 **THE COURT:** I guess -- let's assume that you
16 have established the compelling state interest, and assume
17 that the -- that the -- that you even establish the law to
18 be narrowly tailored to meet the interest that you
19 defined, and again, as you would define the state interest
20 involved in this case it is how? How would you--

21 **MS. BARTON:** I would direct the Court's
22 attention to the legislative findings, and that's attached
23 to the plaintiff's first amended complaint, and what it
24 talks about is that there is a psychological harm to
25 children by being exposed to altra violent explicit

1 videos. Even though the legislative history refers to the
2 fact that protecting minors from possibly aggressive
3 behavior, we do not have to meet the Brandenburg test
4 because of Brandenburg test does not apply when talking
5 about psychological harm to a minor.

6 **THE COURT:** So assuming I buy all of your
7 argument up to that point, how in the world can you argue
8 that this statute is sufficiently definite for retailers
9 to put them on notice of their obligation not to sell in
10 order to avoid jail?

11 **MS. BARTON:** Well, your Honor, if you look at
12 the Eighth Circuit court decision in the Interactive
13 Software case, the court in that case specifically talks
14 about the vagueness issue and says, that the test is
15 whether an ordinary person is put on notice as to what's
16 illegal. It does not have to be mathematical precision or
17 technologically precise, and even the rating system that
18 the industry adopts incorporates some of the same language
19 that the statutes refers to.

20 **THE COURT:** So every person, the retailer, is
21 suppose to view and sell for herself all of the video,
22 suppose to be in depth enough at the game to go at every
23 level in the video game, right, because in some of these
24 games the lower levels don't contain presumably altra
25 violent acts, but they have to be able to get to the

1 higher levels, which I consider myself relatively
2 ordinary. I know there is no chance in the world, since
3 I've never even played one of these games that -- or an
4 interactive video game that I took it to the top level to
5 order to observe what's there, and then suppose to make
6 this judgment about whether this is altra violent or not.
7 Is that what you're saying?

8 MS. BARTON: Your Honor, that's the same
9 question that they have even in complying with part one,
10 because in part one the store cannot distribute to minor a
11 sexually explicit video.

12 THE COURT: Maybe that should be struck too.

13 MS. BARTON: But they are not challenging
14 that.

15 THE COURT: So what you're saying is because
16 part one might also be unconstitutional, and they are not
17 asking me to strike it, therefore, I should not strike
18 part two?

19 MS. BARTON: No, your Honor. What I'm saying
20 is that if you look at part one in which based on what
21 you're asking me, a retailer may have to look at a video
22 and decide whether it is sexually explicit material.

23 THE COURT: And in order to look at it, he
24 has to be able to get to all the levels, right?

25 MS. BARTON: That's the same issue that

1 they're going to have in looking at the altra violent
2 explicit video game. They are not in any different
3 situation when it comes time to enforcing the statute
4 because they are going to have to look at the video in
5 order to comply with the law which they said they are not
6 challenging.

7 So I don't see how there is an incremental
8 ambiguity or incremental step and now saying well, the
9 retailer is going to have difficulty deciding whether
10 altra violent explicit video games, therefore I will
11 enjoin the entire law from being implemented.

12 **THE COURT:** Isn't it possible counsel, that
13 the challenge to the sexual contents of this material as
14 you go through the levels would be addressed at the time
15 that a prosecution is undertaken as oppose to the
16 challenge here which is to part two only as you say as a
17 facial challenge?

18 **MS. BARTON:** Well, your Honor, that's the
19 same issue again because under part two, if someone is
20 prosecuted, they can raise the challenge the First
21 Amendment in that particular prosecution. So they are in
22 no worst position.

23 **THE COURT:** Right. I just don't
24 understand -- well, all right. Go ahead.

25 **MS. BARTON:** With respect to whether the

1 retailer is going to have to sit there and actually play
2 the game, they are already saying that the system is
3 working, which is the rating system which they have, and
4 in that the rating system they have to decide whether the
5 material is sexually explicit. They have to decide
6 whether it is rated T for teens. They have to decide
7 whether it should be rated for an adult.

8 **THE COURT:** Who, the individual retailer?

9 **MS. BARTON:** I'm saying that based on what
10 you're questioning, you're saying that someone would have
11 to sit down with video game and keep playing until they
12 access the codes or get to a higher level to determine
13 whether this is an illegal game.

14 **THE COURT:** Whether they are subject to going
15 to jail.

16 **MS. BARTON:** Exactly.

17 **THE COURT:** But that's why I asked you, is it
18 your contention that a retailer should reasonably then
19 just rely on the rating system for determining whether a
20 video is salable or not under the statute?

21 **MS. BARTON:** That's obviously not going to be
22 the sole test, but that is one factor that they could look
23 at also obviously and, in fact, within the statute there
24 is a good faith defense if someone complies, if a manager
25 complies with the rating system. Just because the

1 statute--

2 **THE COURT:** You acknowledge that the only
3 safe thing for the retailer to do in deciding whether a
4 given video as altra violent contents or not is to just
5 refuse to sell anything that's rated mature?

6 **MS. BARTON:** The only safe thing?

7 **THE COURT:** Because the only defense that
8 they would have -- the only defense that they would have
9 to a prosecution which seeks them to put them in jail for
10 selling altra violent explicit material would be it's not
11 rated mature. I have not idea that I should even screen
12 it, right? That's there only defense that the statute
13 provides them.

14 **MS. BARTON:** Well, the other defense that's
15 provided is they ask for the I.D. of the individual who is
16 buying it, and so if someone is under the age of 17, then
17 the retailer is on notice. It is like buying liquor.
18 They ask for I.D. when you go to the store, and the
19 individual does not sell liquor to someone who is a minor.

20 Now the fact that there is a difficulty in
21 implementing the statute, that's not the standard. The
22 standard is whether the ordinary person has been put on
23 notice.

24 **THE COURT:** The ordinary person of what age?

25 **MS. BARTON:** Ordinary person --

1 THE COURT: I would suspect that children
2 have little more tolerance for violence for example, and
3 would view it differently than us oldsters who have not
4 been exposed to it during our upbringing.

5 MS. BARTON: Well, your Honor, because there
6 are lines that have to be drawn and because there may be
7 some adjustments that have to be felt within the video
8 industry, that does not mean per se that it is an
9 unconstitutional statute, and even though you may
10 sympathize with some of the retailers comply with a new
11 law, they will have to comply with a new law anyways
12 unless this Court enjoins the entire statute, which they
13 are not asking.

14 I would also like the Court to keep in mind that
15 the Seventh Circuit case and the Eighth Circuit cases are
16 not cases that we have today. For one, the body of
17 research in this area continuously is evolving, and the
18 legislative history refers to some of the more recent
19 studies in -- that have come up to date on the video game
20 industry.

21 The more recent studies, your Honor, show for
22 example that there's a decrease in social behavior. There
23 are some other studies which talk about aggressive
24 behavior after minors play these altra violent explicit
25 video games, and just like the U.S. Supreme Court paid

1 attention to the social science research in the Roper
2 case, we think that you can also pay attention to the
3 social science research that we submitted before this
4 Court.

5 At this point, your Honor, I would rely on my
6 brief and indicate that the plaintiff has the burden of
7 proving irreparable harm. They also have the burden of
8 proving the substantial likelihood of the merits. The
9 Seventh and Eighth Circuit cases are not binding on this
10 Court and, in fact, even in the James case it did not talk
11 about legislative record. What it did, it examined
12 whether the individual in the Kentucky incident could be
13 liable under Kentucky law for the violent behavior that
14 eventually occurred in that case. The court did not take
15 an exact scrutiny of the record. The court did not look
16 at the legislative finding because there was no statute
17 before it.

18 Therefore, this defendant submits that the Sixth
19 Circuit in James is not controlling, at least as it
20 applies to this particular statute. Obviously, the
21 principle that was held by the court in James is something
22 that this Court should pay attention to. However, in
23 James the Sixth Circuit did not say that altra violent
24 explicit video games under no circumstances can be
25 regulated. What it said was it summarized the state of

1 the law up to that point, and since James was decided,
2 there's been an entire body of research that this Court
3 has been directed to pay attention to, and we submit that
4 justifies and proves that the Michigan legislature did
5 have a compelling state interest when it decided to
6 regulate these particular altra violent explicit video
7 games.

8 Thank you.

9 THE COURT: Thank you.

10 MR. LEVASSEUR: Just a couple of quick
11 points. I thought I might at least start by trying to
12 clarify the relationship between the rating system and
13 what this law does.

14 The rating system as a whole series of age levels
15 which essentially are guidelines for parents in buying the
16 games, and the concern -- a major concern is the fact that
17 it is almost certain that the law as written would apply a
18 lot of games which have been rated T for example, which is
19 for people over 13. Games which contained violence, games
20 which contained killing, but are less graphic or because
21 they are of a different kind of context in which it
22 appears are viewed as more appropriate for younger
23 teenagers.

24 For example, in the record is the Medal of Honor
25 game landing which has a landing on the beach in Normandy

1 at the beginning. There is a fair amount of killing in
2 that scene, but it's viewed, at least according to the
3 SRB, as something that's okay for a 14 year old, and I
4 think a lot of people would agree with that.

5 The problem is you can't -- rating system is no
6 aid at all in terms of trying to avoid liability under the
7 statute. If they wanted to try to do something that would
8 make sense on the rating system, that's one thing, but
9 they don't do that.

10 And the affirmative defense that my colleague
11 mentions does not do that at the back door. It says that
12 a store manager can't be held liable if the store is
13 following rating system, but it doesn't say anything about
14 the clerk who does the sale. It is written in a very
15 peculiar manner. I don't know quite what they were
16 getting at but it said if you have managerial
17 responsibility and you include the rating system, then you
18 can't be held liable, but your employees are still out
19 there exposed to liability for making the sales. It
20 doesn't make a lot of sense to be frank.

21 Basically the other point that I want to make, is
22 what you're really hearing today and in the brief is a lot
23 of different arguments for the proposition that we created
24 a new exception to the First Amendment for violent speech
25 as applied to kids. The reference to Ginsberg is

1 basically saying, look. We need another kind of obscenity
2 exception as it applies to kids which the Ginsberg
3 standard is, and I submit to you that first of all, the
4 James case expressly says we're not doing that, and the
5 Supreme Court said that, and basically this issue keeps
6 coming up and the reality as Judge Posner said in the
7 Seventh Circuit case, you know, it's a nice thing to think
8 about, but violence is part of our culture. It's part of
9 children's literature. It's part of everybody's everyday
10 experience. You try figure out how you would construct a
11 Ginsberg exception on the violence side, and you really
12 can't do it, and there's no real basis for doing it either
13 in the record.

14 Now as to the social science, we submitted two
15 expert records from the Illinois case where the experts
16 were state picked. So we have a whole debate among the
17 experts there. We did that as a proper responses to your
18 invitation that we put evidence that we could put in the
19 record, and we put that in. We didn't attach it to our
20 first motion because we had not seen the response yet and
21 justifications, and the motion had been filed before the
22 Court had us in here to talk about proffer. So that
23 seemed to us to be the proper timing.

24 The fact that those experts haven't been deposed
25 doesn't mean it can't be a proffer, the kind of evidence

1 that we can put before the Court. Indeed, what the state
2 has done here is put all the articles in front of you and
3 not had any expert at all. You are just suppose to sit
4 down and read all of these psychological articles and
5 decide whether Dr. Anderson's analysis of a statistical
6 significance of some experiment is or is not persuasive.
7 It seems to be odd to be criticizing us for not having our
8 experts deposed and they don't have experts to begin, but
9 in any event, the more fundamental point it seems to me is
10 that you don't have to look at all of that and try to
11 parse whether our responses is more persuasive than
12 theirs. The reality is the psychological evidence does
13 not satisfy the legal standard even taking it at face
14 value. There's a huge debate out there, but even assume
15 that you take the most aggressive evidence, the ones that
16 they would rely on the most, they say long term over
17 years, what Judge Balk called a glacial process of
18 personality development. That's not good enough under
19 First Amendment standards.

20 So it seem to us given that, the Court ought to
21 find that we have a high likelihood of success and the
22 equities favor preliminary relief.

23 Does the Court no further questions?

24 **THE COURT:** No. Thank you.

25 Ms. Barton, anything else?

1 **MS. BARTON:** The only comment that I would
2 add is Mr. Smith said they are offering these reports as
3 proffers. Well, first of all, at the status conference he
4 said that he was not offering any experts at all, and he
5 just wanted to know if we would call experts, and then
6 they put these -- slip these expert reports in after the
7 fact when they're involved in the Seventh Circuit
8 litigation, and he represented to this Court that the
9 first time he knew about the existence of these experts is
10 after they received what we received, what we filed in
11 this case? I don't think so.

12 This case, the Entertainment Software case in the
13 Seventh Circuit is ongoing. They knew about the experts,
14 and then what they did was wait for the last minute and
15 filed them, and they don't even submit the entire record
16 so we can review them. They refer to paragraphs from
17 other documents that are filed in the Seventh Circuit
18 litigation.

19 We would ask the Court not consider their reports.

20 **THE COURT:** One thing you did not address in
21 your argument Ms. Barton was how I would balance the
22 relative harms of granting or not the preliminary
23 injunctive relief that's requested. Did you want to talk
24 about that?

25 **MS. BARTON:** The only thing that I would add

1 is that in this case the legislature, who is the policy
2 making arm for the state, has passed this law. It will go
3 into effect unless this Court enjoins the implementation
4 of that law. As a matter public policy, statutes are
5 entitled to a presumption of constitutionality. So the
6 harm would be the harm that would be visited on any
7 particular statute by this Court stopping the
8 implementation of the law, and what the plaintiffs are
9 speculating might happened, but they have not presented
10 any evidence to this Court to show that they are going to
11 have difficulties with a particular percentage of the
12 video games that are being displayed. They want you to
13 take their word for it.

14 **THE COURT:** Okay. All right. Well, I'm
15 going to issue a written opinion in this case, and I'll
16 get it done hopefully in time so that if either side wants
17 to pursue appellate review of the call, you'll have the
18 opportunity to do so before the December 1st deadline.

19 **MR. LEVASSEUR:** Thank you, your Honor.

20 **THE COURT:** Thank you both. It is accurate
21 to say that you're only asking the Court enjoin the --

22 **MR. LEVASSEUR:** Title two.

23 **THE COURT:** Part two of the statute, is that
24 right.

25 **MR. LEVASSEUR:** Yes, your Honor.

1 **THE COURT:** Okay. And you would not concede
2 that your failure to challenge the part first is a
3 concession?

4 **MR. LEVASSEUR:** Constitutional considerations
5 are quite different in the obscenity. That's a matter
6 that's less practical. We don't think it has any
7 application to real games in the real world.

8 **THE COURT:** All right. Thank you.

9
10 (Proceedings concluded.)

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2 C E R T I F I C A T I O N

3 I, Ronald A. DiBartolomeo, official court
4 reporter for the United States District Court, Eastern
5 District of Michigan, Southern Division, appointed
6 pursuant to the provisions of Title 28, United States
7 Code, Section 753, do hereby certify that the foregoing is
8 a correct transcript of the proceedings in the
9 above-entitled cause on the date hereinbefore set forth.

10 I do further certify that the foregoing
11 transcript has been prepared by me or under my direction.

12



13

Ronald A. DiBartolomeo, CSR
Official Court Reporter



14 Date

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